Supreme Court, U.S.
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No. 98-208

(15)

In The

Supreme Court of the United States

October Term, 1998

CAROLE KOLSTAD,
Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether punitive damages may be awarded in the jury's discretion in cases of intentional discrimination under Title VII of the 1964 Civil Rights Act, in the absence of egregious conduct.

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CAROLE KOLSTAD,
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On Writ Of Certiorari To The
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for the District of Columbia Circuit

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

A. Introduction.

Respondent American Dental Association ("ADA") is a Chicago-based professional organization whose purpose is to promote the art and science of dentistry and the oral health of the public. It maintains an office of approximately 17 employees in Washington, D.C. who advocate the interests of the ADA and its members' patients before

Congress and Executive Branch agencies (Pet App. 43a; Oct. 23, 1995 Tr. 102-03).

Plaintiff was a high-level, highly compensated employee who worked in the ADA's Washington office. From the time of her hire in 1988, she received regular raises in salary. There is no evidence that she was ever harassed or belittled, and she testified at trial that she generally was pleased about the way she was treated (Oct. 19, 1995 Tr. 53, 55, 59). In 1991, her position was raised in grade, with an increase in pay. After her first and only request for promotion was denied in 1992, she did not tell anyone she believed the decision was based on her gender. Instead, she testified that she was willing to "be gracious about it" and accept the outcome if she could have a salary increase equivalent to what she would have earned in the promotion (*id.* Tr. 20, 57-58, 107-08). While she received in increase in pay thereafter, this lawsuit ensued (*id.* Tr. 19-20).

B. The Promotion Decision at Issue.

In the summer of 1992, Jack O'Donnell, who held the dual role of Director of Legislation and Legislative Policy and Director of the Council on Governmental Affairs and Federal Dental Services ("Legislative Director"), indicated interest in early retirement (Oct. 19, 1995 Tr. 75-76). O'Donnell's job was to analyze proposed Congressional legislation of interest to the dental profession and dental patients and to recommend a course of action (*e.g.*, present officials of the ADA to testify before Congress on the matter, submit written comments to the relevant committee only, or do nothing). Also, it was O'Donnell's task to draft the appropriate documents to communicate the ADA's position in a persuasive manner. O'Donnell was well regarded as a clear writer with a deft understanding of

Congress and the legislative process (Pet. App. 3a, 43a; Oct. 25, 1995 Tr. 50-55, 117-18).[1]

Thomas Spangler, who was Legislative Counsel for the ADA, expressed an immediate interest in the prospective job opening (Oct. 24, 1995 Tr. 127-28). Spangler's activities as Legislative Counsel (working with key committees in Congress, developing legislative strategies, and producing in-depth analyses of proposed legislation) were parallel, in many respects, to O'Donnell's legislative activities. Spangler had performed these same functions as Legislative Counsel for the National Treasury Employees Union ("NTEU") for five years prior to being hired by the ADA in early 1991 (Pet. App. 3a, 44a; Oct. 24, 1995 Tr. 108-111, 116-18). In addition, at NTEU Spangler drafted testimony in support of legislation advocated by his members, and testified before Congress on several occasions (Oct. 24, 1995 Tr. 101-02).

Plaintiff, who was the ADA's Director of Federal Agency Relations, expressed some curiosity about the job when she heard O'Donnell might retire, though her duties focused on regulatory affairs, not legislation.[2] Nonetheless,

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[1] The other component of O'Donnell's job -- Director of the Council on Government Affairs and Federal Dental Services -- was a relatively small part of his job (25 percent of O'Donnell's total workload, at best). It largely involved organizational and administrative duties. (Pet. App. 3a, 43a; Oct. 23, 1995 Tr. 115, 125-26; Oct. 25, 1995 Tr. 58-59).

[2] When plaintiff applied to work for the ADA in 1988 as a lobbyist, she was deemed not qualified for the job but was offered the agency relations position because it was consistent with her background. Plaintiff's only work with legislation had been some 12 years earlier as an Attorney Advisor for the Department of Defense, a job in which legislative activities comprised 25 to 30 percent of her duties (Oct. 19, 1995 Tr. 106).

plaintiff met with O'Donnell in the late summer or early fall of 1992 to gain the benefit of his thoughts on the position. At that time she did not otherwise publicize her potential interest in the job or attempt to meet with any other ADA official to explore the matter further. At the time, plaintiff was not sure that she ultimately would want to apply for the job if O'Donnell retired (Oct. 18, 1995 Tr. 110-111; Oct. 19, 1995 Tr. 77-78, 84, 86; Oct. 25, 1995 Tr. 95).

Leonard Wheat was the Interim Director of the ADA's Washington office. He had directed plaintiff's work and had been her predecessor in the agency relations position. He had interviewed her for that job in 1988, and had recommended that she be hired (Oct. 18, 1995 Tr. 92; Oct. 23, 1995 Tr. 23-26). In October 1992, approximately one month after O'Donnell submitted his notice of retirement, plaintiff determined that she wished to apply for his job. She left a few notes telling Wheat that she wanted to meet with him, although she did not specify that the purpose of her meeting was to discuss her interest in the job. Wheat did not meet with her until about two weeks later (Oct. 19, 1995 Tr. 85-86).[3]

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[3] Plaintiff suggests that Wheat's inability to meet with her was part of a larger pattern of making himself available to "male employees in the office" but not to plaintiff (Pet. Br. 6). This assertion is at odds with the record. Dr. William Allen, the ADA's Assistant Executive Director, testified that he received complaints from men as well as from women about Wheat's unavailability (Oct. 23, 1995, Tr. 144). Thomas Spangler testified that he and others experienced frustration in trying to get Wheat's full attention: "oftentimes we were put off by [Wheat] – all of us were put off all the time. You have to be persistent ... I would make it a point to grab him in the parking lot, if necessary" (Oct. 25, 1995 Tr. 38). Judy Sherman, who agreed with Spangler and Allen that everyone had trouble getting Wheat's attention, nonetheless testified that as a lobbyist whose work was directed by Wheat, she regularly met with him

When plaintiff met with Wheat on October 30, 1992, and told him that she was interested in applying for the job, he was surprised at her interest, as plaintiff had focused on regulations and agencies during her tenure with the ADA. Her job as Director of Federal Agency Relations involved monitoring regulations for issues that might have an impact on the dental profession and patients, keeping groups within the ADA's organization apprised of their status, preparing responses to proposed regulations, and making contacts on these issues with officials and staff of federal agencies. The Legislative Director position, by contrast, required a thorough knowledge of the techniques for developing a legislative strategy, and for advocating the ADA's position before Congress (Oct. 19, 1995 Tr. 86; Oct. 23, 1995 Tr. 48, 63-64).

On November 20, 1992, the ADA advertised internally the opening for O'Donnell's position (JA-54).[4] Spangler and plaintiff applied. The ADA's Assistant Executive Director, Dr. William Allen, was responsible for making the selection (Oct. 23, 1995 Tr. 64-65).

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several times a day on legislative matters, albeit often in brief encounters due to Wheat's overburdened schedule (Oct. 25, 1995, Tr. 103-05).

[4] The notice regarding the position listed the following criteria for applicants:

> JD or LLB degree and at least 10 years experience in legislative advocacy/governmental affairs including a minimum of 3 years related experience with the Federal Government, preferably as a Congressional staff member, or with an association or as a legal/legislative representative for a political party; solid knowledge of the Federal system and legislative/regulatory process; strong oral/written communications skills.

Dr. Allen was very familiar with Spangler's and plaintiff's respective qualifications. From 1986 to 1988, Dr. Allen headed the Washington office, holding the dual position of Director of the office and Assistant Executive Director for Legislative Affairs. After nearly two years in Washington, in late 1988, Dr. Allen was asked to become the Assistant Executive Director in Chicago. At the same time, he was asked to maintain a significant presence in the Washington, D.C. office and to retain the position of Assistant Executive Director of Legislation. Thus, he was in Washington regularly (Oct. 19, 1995 Tr. 160; Oct. 23, 1995 Tr. 105-06, 112-14).

Wheat performed the formal interviews for O'Donnell's position and indicated on "applicant assessment forms" for plaintiff and Spangler that each met the minimum qualifications of the posting, although he indicated that Spangler was more qualified (JA-84 to JA-89).[5] Allen testified that in the second week of December of 1992, he met with plaintiff and Spangler for an informal discussion about the job (Oct. 23, 1995 Tr. 150-51), but plaintiff denied Allen met with her (Oct. 18, 1995 Tr. 127-28). Allen also

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[5] Plaintiff cites the court of appeals' panel decision for the proposition that Spangler failed to meet the posted job requirements, and further asserts that Wheat and Allen conceded the same at trial (Pet. Br. 5). In fact, Wheat's testimony on this point was not so stark as represented. Wheat testified that he believed Spangler to be eminently qualified because "Mr. Spangler had the necessary background, legal, legislative" (Oct. 20, 1995 Tr. 70). Allen testified that he also thought Spangler better qualified, but in his estimation, neither Spangler nor plaintiff met the precise written terms of the job posting (Oct. 23, 1995 Tr. 156). Spangler testified that he met the requirements of the job because "[a]t the time I applied for the position, I had ten-and-a-half years as an advocate in various capacities dealing with governmental agencies, whether it be as chief negotiator [for the NTEU] or whether it be as a lobbyist, and a variety of other functions" (Oct. 24, 1995 Tr. 131; *see also id.* 127-28).

consulted with O'Donnell to get his opinion about the candidates. O'Donnell recommended Spangler as better qualified (Oct. 25, 1995 Tr. 72-73). So, too, did lobbyist Judy Sherman, who asked Wheat to tell Allen that she thought Spangler should be selected for the position (Oct. 25, 1995 Tr. 108-09).[6] Allen chose Spangler for the job.

C. The Selection Process.

Plaintiff's account of the selection process omits mention of much of the evidence before the district court and jury.[7] She takes issue with Allen's manner of

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[6] Sherman relied on the Legislative Director to prepare testimony for the legislative matters assigned to her and believed, from her prior work with plaintiff and Spangler, that Spangler could produce persuasive writing and plaintiff could not (Oct. 25, 1995 Tr. 109).

[7] At the same time the ADA announced the Legislative Director job opening that is at issue in this case (JA-54), it also advertised two other, higher level jobs filled by female employees of the ADA (Pl. Trial Exh. 4, unredacted version in Joint Appendix filed with the *en banc* court of appeals at JA 166-68). Dr. Allen promoted one of the employees to the position of Director of State Government Affairs (Oct. 23, 1995 Tr. 145-46).

Plaintiff misleadingly claims widespread gender discrimination by the ADA, pointing to a so-called "census" of individuals who occupied "high level positions" which she says shows very few women in such jobs (Pet. Br. 5-6 n.6). What plaintiff fails to state is that "high level" jobs were defined at trial as level 9 through 14 (Oct. 19, 1995 Tr. 8-11). Females occupied 12 of the 18 jobs graded at level 10. Seven of 22 employees in level 9 were women (JA-48 to JA-51). Thus, there were far more women in "high level" positions than plaintiff represents.

communicating the decision to her (Pet. Br. 8). When Allen called plaintiff to give her the news, he did not tell her that she was not chosen because she was not considered as good a writer as Spangler or that he was more suited than she to perform the job. Rather, he emphasized her value to the ADA in her current position (Oct. 24, 1995 Tr. 7-8). Allen did not "abandon" these reasons in favor of new ones at trial, as plaintiff suggests. Instead, he testified that he presented the decision to plaintiff in this manner because he thought it "would be a cruel thing to do . . . to do a comparison [with the successful candidate] when you're telling somebody that they didn't get a position, and I think it's much kinder to try and emphasize the strong points that Mrs. Kolstad had, which was her job she was doing in the Federal Agency area" (Oct. 24, 1995 Tr. 8).

Plaintiff contends that Allen did not review her annual evaluations or written work product at the time he was making his decision (Pet. Br. 8-9). There is no dispute, however, that Allen had worked with plaintiff since 1988 and Spangler since 1991 and was familiar with the performance, skills, and abilities of both, and had reviewed plaintiff's written work (Oct. 23, 1995 Tr. 120-21; Oct. 24, 1995 Tr. 38-48). Also, he signed some of plaintiff's performance evaluations (JA-21, JA-29).

Plaintiff also faults Allen for his belief that she lacked legislative lobbying experience because, according to plaintiff, he failed to recognize that some 12 years earlier she had accompanied DOD officials to Capitol Hill to testify (Pet. Br. 9). Allen was not mistaken in this regard, however, for by plaintiff's own testimony, her duties at the DOD necessarily did not involve lobbying, as Executive Branch agencies are not permitted to lobby Congress (Oct. 19, 1995 Tr. 36).

Plaintiff makes much of the fact that Allen rewrote the Legislative Director job description by modifying the "most important responsibility" ("maintain[ing] liaison with federal agencies, bureaus, and Administration") to add the word "Congress" before "federal agencies" (Pet. Br. 8).[1] Plaintiff suggests that this was done merely to give Spangler an unfair advantage in competing for the job. What plaintiff does not mention is that she, herself, testified that when she saw the revised description for the Legislative Director job, her only surprise was that it emphasized regulatory activities at all: "...from observing what he [O'Donnell] did...there were a couple of things that were strange, that there was a lot of emphasis on regulatory issues, and he didn't -- Mr. O'Donnell had not done much of that." (Oct. 19, 1995 Tr. 76). Moreover, plaintiff did not dispute that after Spangler assumed the Legislative Director job, he was performing essentially the same duties as had been performed by O'Donnell (*id.* Tr. 77). Thus, while Allen did use excerpts of the Legislative Counsel job description to revise the Legislative Director description, what was added was language that simply reflected what the focus of the job already was.[2]

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[1] The Joint Appendix supplied to the Court does not contain the entire draft job description, including the above quoted portion. The full description, containing Allen's handwritten notations, can be found in the Joint Appendix filed with the *en banc* court of appeals (Pl. Tr. Exh. 3, *en banc* JA 158-165).

[2] There always had been overlap between O'Donnell's activities as Legislative Director and Spangler's as Legislative Counsel. Both analyzed prospective federal legislation of interest to the ADA and its members' patients, O'Donnell while tracking legislation, Spangler in conjunction with his duties in lobbying congressional committees with jurisdiction over those issues (Oct. 24, 1995 Tr. 109-11; Oct. 25, 1995 Tr. 50). Both drafted legislative summaries as part of their respective jobs (Oct. 24, 1995 Tr. 109, 116-117; Oct. 25, 1995 Tr. 50-51). O'Donnell recommended courses of action to be taken by the ADA's

Plaintiff and Spangler were employees in an office of fewer than 20 people and their strengths and weaknesses were well known by Allen (Oct. 23, 1995 Tr. 59, 113-14, 119-25). Furthermore, every witness besides plaintiff testified that they believed Spangler was more qualified than plaintiff was for the job (Oct. 23, 1995 Tr. 69-70 (Leonard Wheat); *id.* Tr. 154-55 (William Allen); Oct. 24, 1995 Tr. 86-87 (former General Counsel for Respondent, Mary Logan); Oct. 25, 1995 Tr. 72-73 (Jack O'Donnell); *id.* Tr. 108 (Judy Sherman)).[10] These were witnesses whom plaintiff had identified as most capable of assessing her and Spangler's respective qualifications (Oct. 19, 1995 Tr. 116).

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organization with respect to pending legislation, and Spangler developed legislative strategies to carry out the course of action chosen (*id.*).

[10] Plaintiff distorts the record with respect to Leonard Wheat's alleged use of the term "bitch" or "battleaxe" and telling of jokes (described by plaintiff as jokes about the "female anatomy") (Pet. Br. 6). As the court of appeals panel recognized, this testimony was contested (Pet. App. 48a) (no one except plaintiff so testified, and Wheat's description of jokes he told was being those one would hear on late-night television, Oct. 23, 1995 Tr. 40). Additionally, plaintiff herself could not remember any of the jokes allegedly told by Wheat, when they were told, or what aspects of the "female anatomy" were allegedly referenced in the jokes (Oct. 18, 1995 Tr. 121-23; Oct. 19, 1995 Tr. 65-66). She also testified that Wheat stopped telling her such jokes when she told him that she found them offensive (Oct. 19, 1995 Tr. 66-67). Furthermore, plaintiff's recollection of Wheat's alleged use of "bitch" or "battleaxe" amounted to allegations he used the words about two women who were not even employed in the ADA's Washington office (one was a non-employee of ADA); she did not testify that he used this term to describe plaintiff (Oct. 18, 1995 Tr. 120-22). Wheat conceded that he did, on occasion, express frustration when the staffs of members of Congress (including female staff members) blocked his access to the Congressional Representatives he was trying to contact because "if I can't present the argument, I can't do what I am supposed to do." (Oct. 23, 1995 Tr. 44).

D. The Decisions Below.

The case was tried to a jury. After the close of evidence, before the jury was instructed, the district court dismissed plaintiff's claim for punitive damages (Pet. App. 45a; JA-104). The jury found that the ADA discriminated against plaintiff on the basis of sex by selecting Spangler for the Legislative Director position (JA-110).

The ADA filed a post-trial motion to set aside the jury verdict. The district court issued a decision finding that "no direct evidence of sex-based motivation on the part of the ADA was presented" (Pet. App. 71a). The district court further found that the only circumstantial evidence favorable to the plaintiff was that the male had been "pre-selected" for the job (Pet. App. 71a-72a). There was nothing about the pre-selection, however, that was suggestive of gender-based discrimination (*id.*):

> What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler. For aught that appears in this record their genders might have been reversed, or they of the same sex. That one was male, and the other female, is a mere fortuity. There is simply no basis, other than *post hoc ergo propter hoc* reasoning to relate Kolstad's rejection for the post to her gender: to wit, Kolstad is female; she was rejected in favor of a "pre-selected" male for a position for which she was qualified; *ergo*, the reason for the "pre-selection" must have been sex.

The district court ruled it was compelled by circuit precedent to allow the jury verdict to stand (Pet. App. 73a-74a). The court stated that the evidence was "insufficient to

prove *to the Court's satisfaction* that her sex or his more likely than not had anything to do with her rejection," and concluded: "Were it open to this Court to set aside the verdict under Fed. R. Civ. P. 50(c), however, this Court would do so" (Pet. App. 74a, emphasis in original).

The court of appeals panel affirmed the district court's failure to set aside the jury verdict (Pet. App. 46a-49a), but voted to reverse the dismissal of plaintiff's claim for punitive damages. The panel ruled that evidence sufficient to prove intentional discrimination is also sufficient to allow the jury to decide punitive damages (Pet. App. 49a-53a).

The ADA's suggestion for rehearing *en banc* was granted, limited to the issue of punitive damages (Pet. App. 75a-76a). The *en banc* decision of the court of appeals affirmed the district court's dismissal of the punitive damages claim (Pet. App. 22a). The court held that in order to recover punitive damages, there must be a showing of egregious conduct (Pet. App. 2a). It found no such evidence in this case (Pet. App. 20a-21a, footnote omitted):

> The evidence in this case does not show the kind of egregious discriminatory conduct necessary for the imposition of punitive damages. As the district court noted, 912 F.Supp. at 14-15 [Pet. App. 71a-72a], the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales - that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997), vacated pending rehearing *en banc*, 124 F.3d 1302 (D.C. Cir. 1997), but in this case it falls far short of supplying grounds for a punitive award.

The court of appeals also found that while evidence of pre-selection might permit an inference that the employer's proffered reasons for an employment decision were pretextual, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet. App. 21a). It concluded that "pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best" (Pet. App. 22a).

SUMMARY OF ARGUMENT

The Civil Rights Act of 1991, § 102, 105 Stat. 1072, provides for the award of punitive damages under Title VII of the Civil Rights Act of 1964 in cases of intentional discrimination against nongovernmental entities, in addition to remedies already available under Title VII, and in addition to compensatory damages (for future pecuniary loss, pain and suffering, and for other nonpecuniary losses) "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1).

Plaintiff Carole Kolstad's argument that all cases of intentional discrimination are eligible for jury consideration of punitive damages is inconsistent with the two-tiered structure of the Civil Rights Act of 1991, the common law nature of punitive damages, and the traditional roles of the court and the jury. Actions undertaken with malice or with

reckless indifference to federally protected rights necessarily involve egregious conduct, and it is the court's role to make the threshold determination of whether sufficient evidence exists for the jury to consider the award of punitive damages under the statutory standard.

The Act provides for two tiers of liability, one for basic liability and for compensatory damages, and the other for punitive damages available only if the plaintiff makes the additional showing under 42 U.S.C. § 1981a(b)(1). If the only check on the award of punitive damages were the jury's "discretionary moral judgment," as urged by plaintiff, that would "flatten" the two-tiered scheme of the statute in a manner unintended by Congress (Pet. App. 6a).

Plaintiff incorrectly argues that punitive damages depends only on the isolated mental state of the defendant. Evil motive (in the case of malice) or other requisite intent is a necessary but not sufficient ingredient for the award of punitive damages under Title VII, because "[t]he focus is on the character of the tortfeasor's conduct in imposing punitive damages." *Smith v. Wade*, 461 U.S. 30, 54 (1983). The type of conduct required for punitive damages is a "discriminatory practice" committed with "malice" or with "reckless indifference to the federally protected rights." Mental state cannot be separated from the conduct at issue under the statute. The conduct necessary to impose punitive damages must be egregious, as the very purpose of punitive damages awards is to punish a defendant "for his outrageous conduct and to deter him and others from similar conduct in the future." *Smith v. Wade*, *id.*, *quoting* Restatement (Second) of Torts § 908(1) (1979).

ARGUMENT

I. THE TWO-TIERED STRUCTURE OF THE ACT SUPPORTS DIFFERENTIATION BETWEEN THE BASIC LIABILITY STANDARD AND THE PUNITIVE DAMAGES STANDARD.

A. A Comparison Between the Compensatory and Punitive Damages Provisions in the 1991 Civil Rights Act Confirms the Two-Tiered Structure of the Act.

In the 1991 Civil Rights Act, Congress allowed for compensatory and punitive damages for violations of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 1981a. The structure of the Act provides for two tiers of culpability in cases of intentional discrimination, one for basic liability and compensatory damages, and the other for punitive damages.

The Act authorizes Title VII plaintiffs to recover punitive damages against an employer "who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of disparate impact)" where the plaintiff:

> demonstrates that [the employer] engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a(a)(1) and (b)(1). By this language, the Act makes clear that the availability of punitive damages is limited to a specific subclass of cases: ones involving intentional discrimination but, more narrowly, ones in which

the plaintiff also demonstrates that the employer engaged in purposeful discrimination with "malice" or with "reckless indifference" to federally protected rights.

Whereas the predicate for both compensatory and punitive damages is "intentional discrimination," 42 U.S.C. § 1981a(a)(1), compensatory damages are available irrespective of any additional showing concerning the nature of the employer's actions or the mental state associated with those actions. The Act simply states that "the complaining party may recover compensatory damages" in Title VII cases of intentional discrimination "as allowed in subsection (b)." *Id.*

Subsection (b) is headed "Compensatory and punitive damages." No separate evidentiary standard of proof for compensatory damages is set forth. Rather, subsection (b) lists the types of compensatory damages recoverable ("future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses"), § 1981a(b)(3), states that they are exclusive of economic damages otherwise recoverable under Title VII, § 1981a(b)(2), and places a cap on the total award for compensatory and punitive damages, § 1981a(b)(3).

By contrast, subsection (b) sets forth a separate evidentiary burden for punitive damages. Subsection (b)(1) is entitled "Determination of punitive damages." Under that provision, a complaining party may recover punitive damages if she "demonstrates" that the employer "engaged in a discriminatory practice or discriminatory practices" with "malice or with reckless indifference to the federally protected rights of an aggrieved individual."

The very structure of this provision shows that something more than proof of basic liability or the award of

compensatory damages is required. If no additional showing of culpability were required, the provision would not set forth separately what the plaintiff needed to "demonstrate[]" with regard to malicious or recklessly indifferent "discriminatory practices." Instead, the provision for punitive damages would be parallel to the provision for compensatory damages (which requires no additional showing), and would simply recite that punitive damages could be awarded in addition to compensatory damages, without a higher standard of proof. The statute requires more, and that is the most basic reason why plaintiff's argument that all cases involving intentional discrimination should go to the jury on punitive damages is inconsistent with the language of § 1981a.

The conclusion reached by the court of appeals flows from this structure of the Act (Pet. App. 5a):

> We think that by enacting a separate provision setting out a special standard for the imposition of punitive damages, Congress showed that it did not intend to make punitive damages automatically available in the standard case of intentional discrimination under Title VII. The structure of the statute -- one standard for basic liability, another for the exceptional remedy of punitive liability -- strongly suggests that, before the question of punitive damages can go to the jury, the evidence of the defendant's culpability must exceed what is needed to show intentional discrimination.

B. The Award of Punitive Damages Under Title VII Depends on the Nature of the Discriminatory Conduct, Not Simply the Mental State of the Defendant.

Plaintiff incorrectly argues that the isolated mental state of the defendant is solely determinative on the issue of punitive damages under § 1981a, and that this result is required by a "literal" reading of the statute. In reality, plaintiff's position is that the words "reckless indifference" should be read in isolation from the rest of the words in the punitive damages provision. Indeed, plaintiff argues that the punitive damages standard is even further removed from the whole text, by parsing "reckless" and "indifference" apart from the rest of the words in the law.

ADA agrees that this case should be resolved on the basis of the language of the statute. But the entire provision, not just a piece of it, must be read in the context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843, 846 (1997); *Conroy v. Aniskoff*, 507 U.S. 511, 515 (1993); *King v. St. Vincent Hosp.*, 502 U.S. 215, 221 (1991). While the employer's mental state is an obvious essential ingredient in a violation committed with malice or with reckless indifference to federally protected rights, it is the discriminatory conduct associated with the mental state that is determinative. The Act requires the plaintiff to prove that the defendant (1) *acted* ("engaged in a discriminatory practice or discriminatory practices") (2) with malice or with reckless indifference to federally protected rights. The two cannot be separated. Otherwise, as plaintiff would have it, defendants would be punished unfairly for thoughts isolated from discriminatory actions. *Cf. Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989) (personal animus as opposed to racial animus not

a basis for Title VII liability). That is not what the statute says.

Plaintiff barely mentions the "malice" prong of § 1981a in her brief, but the difference between malice and reckless indifference in the present context reinforces the statutory requirement not to separate the discriminatory conduct from the employee's mental state.

Malice means with evil motive or an actual intent to injure the plaintiff. *See, e.g., Smith v. Wade*, 461 U.S. 30, 48, 56 (1983). Reckless indifference entails more than negligence and less than malicious behavior with respect to the discriminatory conduct, a point not in dispute (*see* Pet. Br. 17). *See Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994) (recklessness has been equated with deliberate indifference; reckless disregard of substantial risk of serious harm is same as deliberate indifference to that risk; deliberate indifference is more than mere negligence, but less than acting for the very purpose of causing harm or with knowledge it will result). Malicious and reckless conduct are by definition egregious (*see* § II.A., *infra*).

If anything, the malice inquiry focuses more on mental state apart from conduct than does recklessness. Because evil motive or actual intent to harm indicating malice is by its nature egregious, there is no need to gauge the seriousness of the conduct separately from the mental state where malice is involved. For reckless indifference, another layer of analysis enters the picture, because the focus is more often than not on whether the defendant should have known (rather than actually knew) that it was acting in wanton disregard of federally protected rights. For recklessness the statute requires a sufficiently heightened state of conduct to demonstrate objective awareness of the wrongdoing (the "should have known" standard), one always

greater than is sufficient for basic liability. The more serious the conduct, the more likely it will cross the threshold from negligence to recklessness. The EEOC recognizes this principle: "The more blatant and outrageous the discrimination, the stronger the inference that the employer knew or should have been aware of the substantial risk that its behavior had crossed the line of legality." (Brief for the United States and the Equal Opportunity Commission as *Amici Curiae* ["EEOC Br."] at 11). Thus, the determination of recklessness, more than malice, depends upon the relationship between the mental state of the defendant and the degree of seriousness of the discriminatory conduct.

Plaintiff's *amici* suggest that punitive damages make up for small compensatory damages awards in some cases. The size of the compensatory damage award is irrelevant to the availability of punitive damages, save for the aggregate cap on compensatory and punitive damages under § 1981a. Small compensatory damages awards may serve to limit size of punitive damages awards under the "ratio" principle discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-83 (1996). By the same token, higher punitive damages may be awarded for a "particularly egregious act" resulting in small economic damages, or for "particularly reprehensible conduct." *Id.* at 576, 582. In either case, it is the degree of the conduct that governs, not the isolated mental state of the defendant or the small size of the compensatory award.

C. The Ability to Establish Liability Based on Circumstantial Evidence and Judicial Presumptions Reinforces the Two-Tiered Structure of the Statute.

Many cases of intentional discrimination under Title VII are proven by the familiar three step sequence of proof (*prima facie* case, proffer of non-discriminatory reason, and pretext) set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). The majority of the courts of appeals allow the plaintiff to prevail upon the showing of what has been labeled "pretext only," which essentially means that discrimination may be proved inferentially by a showing that the employer's tendered non-discriminatory reasons are false or unbelievable.[11]

Even assuming that the requirements of Title VII are met when liability is established on the basis of "pretext only," such proof of intentional discrimination entirely on the basis of inferences and judicial presumptions may say

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[11] The courts of appeals for six circuits, the Third (*en banc*), Sixth, Seventh, Ninth, Tenth (*en banc*), and District of Columbia (*en banc*), hold that evidence of pretext is ordinarily sufficient to permit the trier of fact to find discrimination. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1292 (D.C. Cir. 1998) (summary judgment) (*en banc*); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (*en banc*) (judgment as a matter of law), *cert. denied*, 117 S. Ct. 2532 (1997); *Kline v. Tennessee Valley Authority*, 128 F.3d 337, 343-47 (6th Cir. 1997) (bench trial); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) (summary judgment); *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998) (summary judgment); *Washington v. Garrett*, 10 F.3d 1421, 1432-33 (9th Cir. 1993) (summary judgment); *Randle v. City of Aurora*, 69 F.3d 441, 451-53 (10th Cir. 1995) (*en banc*) (summary judgment).

nothing about the state of mind of the defendants, in either a subjective or objective fashion.

Similarly, employers can be held liable under Title VII on the basis of constructive knowledge flowing from negligence, as opposed to willful blindness. *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996). It is undisputed that mere negligence is not sufficient to trigger punitive damages under the recklessness standard (Pet. Br. 17).

The ability to prove "intentional discrimination" either without reference to the actual state of mind of the defendant or by mere reference to a negligent constructive knowledge reinforces the two-tiered structure of the Act and the separation between the basic liability standard and the standard for punitive damages. Submission of every case of intentional discrimination to the jury for consideration of punitive damages truly would "flatten that scheme" (Pet. App. 6a). Plaintiff's approach "virtually obliterates any distinction between" cases involving proof of liability through pretext alone and the heightened standard of proof required for punitive damages. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132-133 (1988). Flattening of the statutory scheme, as proposed by plaintiff, would increase the federal courts' staggering workload of employment discrimination cases, place meritorious claims in danger "of being lost in a sea of meritless suits," and serve no purpose other than as a "bounty" for private litigation. *Smith v. Wade*, 461 U.S. at 91 (Rehnquist, J., dissenting).

D. The Case Law Confirms the Two-Tiered Nature of the Statute, by Reference to the Type of Conduct Required to Impose Punitive Damages.

The decisions of this Court and the courts of appeals overwhelmingly recognize that a heightened state of conduct is required for the imposition of punitive damages, and state directly or by implication that the defendant's mental state is not alone sufficient to impose punitive damages. In *Smith v. Wade*, this Court emphasized that the "focus is on the character of the tort feasor's conduct in imposing punitive damages." 461 U.S. at 54. This Court referred to recklessness as the "usual threshold for punitive damages," *id.* at 53, and quoted the Restatement (Second) of Torts § 908 in stating that the purpose of punitive damages is to punish the defendant for "outrageous conduct." *Id.* at 54. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages "by definition" are intended to punish the tortfeasor and deter him and others from "similar extreme conduct"); *see also BMW v. Gore*, 517 U.S. at 579 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages, does not establish the high degree of culpability that warrants a substantial punitive damages award").

The decisions of the courts of appeals also uphold the two-tiered culpability structure of the Act by reference to the type of conduct necessary for punitive damages. For example, the Ninth Circuit requires "plaintiffs seeking punitive damages under Title VII to make a showing beyond the level of intentional discrimination required for compensatory damages." *Ngo v. Reno Hilton Resort Corp.*, 156 F.3d 988, *amending* 140 F.3d 1299, 1304 (9th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3409 (U.S. Dec.

18, 1998) (No. 98-999). In like manner, the Seventh Circuit has held under Title VII that "[p]unitive damages requires more" and presents a "higher hurdle than merely proving the underlying unlawful discrimination." *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 636 (7th Cir. 1996); *Tincher v. Wal-Mart Stores, Inc.*, 118 F.3d 1125, 1132-33 (7th Cir. 1997) (plaintiff "must go beyond proving" intentional discrimination to obtain punitive damages). As recapitulated by the court of appeals (Pet. App. 19a-20a, footnote omitted):

> We note in conclusion that our decision today aligns us with all but one of the several circuit courts to address this question. See *McKinnon v. Kwong Wah Restaurant*, 83 F.3d 498, 508 (1st Cir. 1996) (endorsing concept of a higher standard for punitive damages under § 1981a, and noting that such damages "are awarded as a matter of public policy to punish outrageous conduct by the defendant or to deter similar conduct in the future"); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997)(holding that under § 1981a, "[p]unitive damages are an extraordinary remedy, to be reserved for egregious cases," and "are not an element of recovery in every case involving an intentional tort") (citation omitted); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1216 (6th Cir. 1996) (despite sufficiency of evidence of liability and "duplicitous" actions of defendant's employees, evidence held insufficient for punitive damages); *Emmel v. Coca-Cola Bottling*, 95 F.3d 627, 636 (7th Cir. 1996) (characterizing standard for punitive damages as a "higher hurdle" than

> that for proving the underlying discrimination); *Karcher v. Emerson Electric Co.*, 94 F.3d 502, 509 (8th Cir. 1996) (although jury could properly infer intentional sex discrimination from inconsistent nature of hiring process and failure to select and train women, it could not find malice or deliberate indifference); *Ngo v. Reno Hilton Resort Corp.*, 1998 WL 162166 (9th Cir. Apr. 9, 1998) (requiring "evidence of conduct more egregious than intentional discrimination to support an award of punitive damages in Title VII cases"); but see *Luciano v. Olsten Corp.*, 110 F.3d 210, 219-20 (2d Cir. 1997) (finding that no additional evidence is required for punitive liability).[12]

E. The Two-Tiered Standard of the Statute is Consistent with Prior Decisions of This Court.

1. *Smith v. Wade.*

Plaintiff is incorrect in arguing that *Smith v. Wade* allows for the imposition of punitive damages on the basis of the same conduct minimally necessary to impose liability. In *Smith v. Wade*, the "sufficiently serious misconduct" on the defendant's part was the same for both compensatory and punitive damages, because the standard for compensatory

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[12] In addition, *see Farpella-Crosby v. Horizon Health Corp.*, 97 F.3d 803, 810 (5th Cir. 1996) (vacating punitive damage award while upholding finding of intentional discrimination); *Splunge*, 97 F.3d at 491 (same); *Browning v. President Riverboat Casino-Missouri*, 139 F.3d 631, 637 (8th Cir. 1998) ("§ 1981a requires a showing of more than intentional discrimination to recover punitive damages").

liability in that case was "as high as or higher than the usual threshold for punitive damages." 461 U.S. at 52, 53. As explained by the court of appeals, "while the criterion adopted by the Court for punitive damages was not egregious in relation to the applicable compensatory standard, it clearly was so in relation to ordinary tortious conduct" (Pet. App. 11a). The court concluded (*id.*): "Thus the decision in *Smith v. Wade* supports rather than refutes the idea that some form of egregiousness is essential for punitive damages."[13]

It is clear from the discussion in *Smith v. Wade*, 461 U.S. at 50-54, that the same threshold for liability and punitive damages occurs only in those causes of action -- such as malicious prosecution, intentional infliction of emotional distress, defamation of a public figure, or a constitutional violation of the type at issue in *Smith v. Wade* -- where the standard for compensatory liability is high. In no instance is there a single-tier structure for liability and punitive damages where the threshold for liability is as low as it can be in a Title VII case.

2. *The ADEA Cases.*

Plaintiff relies extensively on *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), a case under the Age Discrimination in Employment Act (ADEA). *Hazen Paper* construed the "willfulness" provision in the ADEA to

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[13] Plaintiff misleadingly argues (Pet. Br. 43) that the court of appeals held that punitive damages under Title VII could only be awarded for discriminatory conduct "equivalen[t]" to such barbaric physical abuse as in *Smith v. Wade*. The Court's reference to the jury instruction in *Smith v. Wade* (Pet. App. 11a) clearly was for the purpose of illustrating that the liability standard in *Smith v. Wade* was "egregious" in relation to ordinary tortious conduct, not for the purpose of equating the *Smith v. Wade* jury instruction with the Title VII standard for punitive damages.

determine whether it included a requirement of outrageousness. The Court had previously decided, in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 (1985), that liquidated (double) damages were not warranted under the ADEA's willfulness provision where the defendant neither "knew [nor] showed reckless disregard for the matter of whether" its policy violated the statute.

In *Hazen Paper*, the court reaffirmed the *Thurston* definition of "willful," and stated that, "[o]nce a 'willful' violation has been shown, the employee need not additionally demonstrate that the employer's conduct was outrageous...." 507 U.S. at 617.

Although the Court in *Thurston* had observed that liquidated damages under the ADEA are "punitive in nature," 469 U.S. at 125, the additional amounts owing for willful violations of the ADEA are denominated "liquidated damages," not punitive damages. 29 U.S.C. § 626(b), incorporating 29 U.S.C. § 216(b). The other obvious difference was highlighted by the court of appeals in this case (Pet. App. 15a): "To begin with, the relevant language is different: the ADEA requires 'willful' conduct, not 'malice' or 'reckless indifference'."

Moreover, though this Court rejected an additional requirement for outrageousness on top of the *Thurston* "willfulness" standard, it did not jettison the two-tiered liability principle of *Thurston*: "we continue to believe that the 'knowledge or reckless disregard' standard will create two tiers of liability across the range of ADEA cases." 507 U.S. at 616. There is no suggestion in either *Thurston* or *Hazen Paper* that evidence sufficient to impose liability will

always require submission of the liquidated damages issue to the jury.[14]

II. THE STATUTORY STANDARD FOR PUNITIVE DAMAGES INCLUDES THE ELEMENT OF EGREGIOUSNESS OR OUTRAGEOUSNESS DERIVED FROM COMMON LAW.

A. Egregiousness And Malice/Recklessness Are Not Mutually Exclusive; Malice And Recklessness Are By Definition Egregious.

Plaintiff endlessly repeats the argument that the court of appeals has added words to the statute by holding that egregious conduct is required for the imposition of punitive damages. Because plaintiff has blindly parsed "reckless" and "indifference" without reference to the conduct ("discriminatory practices") by which punitive damages are to be judged, plaintiff and her *amici* miss the central point: punitive damages "by definition" encompass "extreme conduct." *City of Newport*, 453 U.S. at 266-67.

The court in *Hernandez-Tirado v. Artau*, 874 F.2d 866 (1st Cir. 1989), similarly recognized that punitive damages by definition entail outrageous conduct. The court noted that this Court specifically focuses the punitive damages inquiry "on the character of the tort feasor's conduct," and that punitive damages "require conduct that is 'outrageous', either because of the person's 'evil motive' or

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[14] The formulation "more likely knows its conduct is illegal," in *Hazen Paper*, 507 U.S. at 617, relied upon by plaintiff, may be a useful shorthand formulation of the test for a willful violation of the ADEA, but by itself does not state the complete or accurate test for reckless indifference of federally protective rights under the Civil Rights Act of 1991.

because of his 'reckless indifference' to the rights of others." 874 F.2d at 869, *quoting Smith v. Wade*, 461 U.S. at 54, 56.

The EEOC comes close to accepting the simple truth that egregiousness and recklessness are part of an equation, rather than a sum. In referring to statements in Congress suggesting that punitive damages will be awarded only in egregious cases, the EEOC states (EEOC Br. 23):

> The word "egregious," however, is commonly used as shorthand for "more culpable" conduct. Such usage would be perfectly consistent with the statutory text as enacted, if the references to "egregious" refer to the culpability that results from acting with malice or reckless disregard of another's rights. Indeed, the Restatement of Torts uses the word "outrageous" in precisely this manner.

The EEOC concludes that the "better reading of those legislative comments is simply that Members of Congress considered any conduct in violation of the statutory 'malice or reckless indifference' standard to be, by definition, egregious" (*id.*).

Construing the statute in this manner, by equating recklessness and egregiousness and by doing so with reference to defendant's conduct instead of an isolated mental state, is in harmony with the decision of the court of appeals. It preserves two-tiered liability without the claimed additions to the statute. It also explains, contrary to plaintiff's argument, why the need for egregious conduct is wholly consistent with a "literal" reading of the statute.

B. Congress Intended for Egregious Conduct To Be a Necessary Element of Punitive Damages, As Derived From Common Law.

This Court has issued caution concerning the extent of the utility of the legislative history of the 1991 Civil Rights Act because of its ample dosage of "frankly partisan statements." *Landgraf v. USI Film Products*, 511 U.S. 244, 262 (1994). Legislative history and the principles of statutory construction, however, confirm the appropriateness of equating the statutory standard of maliciousness and recklessness with egregiousness under common law principles, confirm the two-tiered framework of the statute, and necessarily reject plaintiff's argument that every case of intentional discrimination can result in an award of punitive damages.

First, plaintiff ignores the fundamental principle of statutory construction that when Congress uses a term that has been applied at common law, the term has the same meaning as in common law. As this Court stated in *Molzof v. United States*, 502 U.S. 301, 307 (1992), *quoting Morissette v. United States*, 342 U.S. 246, 263 (1952):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

See United States v. Shabani, 513 U.S. 10, 13 (1994) ("settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms").

In *Molzof*, this Court construed 28 U.S.C. § 2674, the Federal Tort Claims Act provision excluding the award of punitive damages against the United States. This Court recognized that punitive damages is a "legal term of art that has a widely accepted common-law meaning," and is a concept "deeply rooted in the common law." 502 U.S. at 306, 311. The Court stated that the common law definition of punitive damages "focuses on the nature of the defendant's conduct," and agreed with the characterization that punitive damages are those "intended to act as punishment for egregious conduct." *Id.* at 307, 305-06.

The Restatement (Second) of Torts, quoted in *Smith v. Wade*, 461 U.S. at 46-48, recaps the common law standard in a manner that parallels the language of the Act: "Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." *Id.* at § 908(2). Comment b to § 908 similarly states: "since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded only for conduct for which this remedy is appropriate -- which is to say, conduct involving some element of outrage similar to that usually found in crime."

The EEOC (EEOC Br. 20 n. 15) argues alternatively that the punitive damages standard in § 1981a represents a departure from the common law. The necessary implication of this argument is that Congress called the remedy punitive damages but really meant to establish a lesser form of

remedy. As concurring Judge Randolph wrote, such a result could only be "the product of a very clever draftsman, someone who wanted to convey the appearance of limiting punitive damages to exceptional cases, while hoping that courts would draw upon other legal sources to find the limitation an illusion" (Pet. App. 23a). Judge Randolph correctly concluded otherwise, stating that "[t]hose who voted for this legislation surely must have believed they were voting for a two-tiered damages system," intending "punitive damages to be reserved for only the worst cases" (*id.*).

Second, as noted by the court of appeals (Pet. App. 6a-7a), the legislative history of the Civil Rights Act of 1991 supports the two-tiered nature of the statute. The House Report states:

> Plaintiffs must first prove intentional discrimination, then must prove actual injury or loss arising therefrom to recover compensatory damages, and must meet an even higher standard (establishing that the employer acted with malice or reckless or callous indifference to their rights) to recover punitive damages.

H.R. Rep. No. 40(I), 102d Cong., 1st Sess. at 72.

Third, the caselaw supports this reading of punitive damages, borne of the common law. In addition to the cases cited by the court of appeals recognizing that egregious conduct is necessary for the imposition of punitive damages under 42 U.S.C. § 1981a (Pet. App. 19a-20a, quoted in § I.D., *supra*), the court of appeals also referred to cases which read *Smith v. Wade* as requiring the legal standard of egregiousness to be met in cases under 42 U.S.C. § 1983 (Pet. App. 14a-15a). *See also Barber v. Nabors Drilling U.S.A. Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (plain error

to submit punitive damages to jury under § 1981a where record devoid of evidence of malice or recklessness).

III. SUBMISSION OF PUNITIVE DAMAGES CLAIMS TO THE JURY IN ALL CASES IN WHICH THERE IS SUFFICIENT EVIDENCE TO SUPPORT A LIABILITY FINDING WOULD USURP THE ROLE OF THE COURT.

A. The Traditional Role of the Court Must be Preserved in Cases Involving Claims for Punitive Damages.

By arguing that all Title VII cases of intentional discrimination with sufficient evidence to go to the jury on basic liability should also be submitted to the jury on punitive damages, plaintiff crafts a special rule warranted neither by the statute nor by precedent. The court of appeals correctly concluded that there is no basis for plaintiff's argument "to deny the court's traditional role in deciding whether a reasonable juror could find the defendant's conduct sufficiently egregious for the punitive damages issue to be submitted to the jury in the first instance" (Pet. App. 14a).

The general principle announced by the Court in *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943) (citations omitted) still pertains:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by

> judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

The preservation of the traditional role of the trial court in determining whether there is sufficient evidence to go to the jury applies in employment discrimination cases involving punitive damages, the same as in other areas of the law. *See Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997); *Fisher v. Vassar College*, 114 F.3d 1332, 1346-47 (2d Cir. 1997) (*en banc*); *see also Jackson v. Bunge Corp.*, 40 F.3d 239, 246-47 (7th Cir. 1994) ("while the measurement of punitive damages is a jury question, the preliminary question of whether the facts of a particular case justify the imposition of a punitive damages award is properly one of law"). As stated by the Fourth Circuit in *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 306 (4th Cir. 1998), *quoting Stephens v. South Atlantic Canners, Inc.*, 848 F.2d 484, 489-90 (4th Cir. 1988), *cert. denied*, 488 U.S. 996 (1988), "[a]though any form of discrimination constitutes reprehensible and abhorrent conduct, not every lawsuit...calls for submission of this extraordinary remedy to a jury."

Plaintiff argues that the jury serves as a check upon itself, retaining "discretionary moral judgment" over whether or not to render an award of punitive damages in any given case. The court of appeals correctly disposed of this argument by noting that the reference to "discretionary moral judgment" in *Smith v. Wade*, 461 U.S. at 52, "simply restates the commonplace that the jury can choose *not* to award them even when the evidence is sufficient to give it the choice" (Pet. App. 13a).

The court of appeals was also correct in concluding that, in enacting the punitive damages standard in the Act, Congress was doing more than merely drafting jury instructions for the jury to apply in its "unchecked discretion" (Pet. App. 15a). By establishing an "even higher standard" than basic liability the plaintiff "must meet" to get punitive damages, Congress was not advocating "simply a verbal formulation to be pondered by juries with no role for the trial court" (*id.*).

B. The Examples of the Extremely Narrow Range of Cases That Plaintiff Would Exempt from Jury Consideration Do Not Furnish a Basis for Submitting All Cases of Intentional Discrimination to the Jury On the Issue of Punitive Damages.

In an attempt to avoid an appearance of overreaching, plaintiff relies on what the court of appeals termed a "mistake-of-law defense" (Pet. App. 16a) to show that not all cases warranting compensatory damages would also be candidates for punitive damages. The mistake of law defense is drawn from the discussion in the dissent below regarding good faith efforts to comply with the law or a good faith assertion of a "bona fide occupational qualification" (BFOQ) defense (Pet. App. 29a-31a). In this Court, plaintiff attempts to expand the argument by referring to "statutory exemptions" and other coverage contours of the federal civil rights laws, with the conclusion that an employer might reasonably believe it was complying with the law (and thus was not recklessly indifferent to federally protected rights) but nonetheless violated the law's substantive provisions.

There is nothing in the statute or in the legislative history to indicate that Congress carved out a narrow path

under mistake-of-law in order to preserve a meaningful distinction between cases eligible and ineligible for punitive damages. Although plaintiff takes issue with the court of appeals' discussion about the limited availability of BFOQ defenses in Title VII cases, she cannot seriously dispute that the "class of disparate treatment cases that could escape exposure to punitive damages on the dissent's theory is small, perhaps vanishingly so" (Pet. App. 17a).

The correct approach is not to find a narrow band of cases that would be exempt from punitive damages, but rather to apply the statute in a straightforward fashion. This starts with the recognition that punitive damages, as rooted in the common law, require extreme or egregious conduct that forms the discriminatory practice. As recognized by the EEOC (EEOC Br. 11), the degree of the conduct will guide the court in determining whether the employer has crossed the threshold of reckless indifference.

IV. THE LOWER COURTS SHOULD IMPLEMENT THE STATUTORY STANDARD FOR PUNITIVE DAMAGES ON A CASE-BY-CASE BASIS.

Under the above principles, the lower courts should proceed on a case-by-case basis to determine whether, in cases of intentional discrimination under Title VII, there is sufficient evidence of malice or whether the conduct is of a sufficiently egregious character to signify that the employer was recklessly indifferent to the federally protected rights of the plaintiff. Under the statute, it is up to the court, not the jury, to determine in the first instance whether there is "not enough evidence" to support a punitive damages award. *Splunge*, 97 F.3d at 491; *see Barber*, 130 F.3d at 710; *Ngo*, 140 F.3d at 1304; *Karcher v. Emerson Elec. Co.*, 94 F.3d 502, 509 (8th Cir. 1996), *cert. denied*, 117 S.Ct. 1692 (U.S. May 12, 1997), 117 S.Ct. 1693 (U.S. May 12, 1997).

Plaintiff recognizes that the determination of eligibility for punitive damages in a Title VII case is "fact-specific" (Pet. Br. 36). Although plaintiff errs in arguing that the trial court should not perform its traditional function of adjudging the sufficiency of the evidence at the threshold of the punitive damages determination, plaintiff is correct in implying that the determination must be made on a case-by-case basis.

The court of appeals suggested that there were certain types of cases that would likely reach the jury on the issue of punitive damages. Examples provided by the court included evidence showing that the defendant engaged in a pervasive pattern of discriminatory acts,[15] or manifested genuine spite and malevolence, or otherwise evinced a "criminal indifference to civil obligations." Pet. App. 13a, *citing Smith v. Wade*, 461 U.S. at 41. These are useful examples, but there should be no *per se* rules defining classes of cases in which it is automatically assumed that

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[15] There was no such evidence in this case. Misplaced is plaintiff's reliance on an expired consent decree which settled a lawsuit between the ADA and a class of women in the early 1980s, and which contained a provision prohibiting pre-selection during the term of the decree (Pet. Br. 11-12). The decree expired more than a year before the decision at issue. It contained a non-admissions clause stating "The ADA denies that it has engaged in any policies, acts, or practices that discriminate against women employees. Nothing in this consent decree shall be construed in any way as an admission of liability on the part of the ADA" (Pl. Proposed Trial Exh. 24A, En Banc JA 316). Finally, it did not identify pre-selection as illegal, only as contrary to Respondent's then-existing policy (JA-16 to JA-17). Contrary to plaintiff's characterization (Pet. Br. 12), the court of appeals panel concluded that the district court did not abuse its discretion in excluding the consent decree under Fed. R. Evid. 403, and stated that "we express no opinion on whether, or in what circumstances, the consent decree might now be admissible as evidence to support Kolstad's claim for punitive damages" (Pet. App. 53a).

punitive damages will lie. Each case will depend on the context of the evidence and all the facts and circumstances of the case.[16] For example, as explained in Comment a, Section 500 of the Restatement (Second) of Torts, Reckless Disregard of Safety, the reasonableness of a course of conduct ordinarily involving a high degree of risk of serious harm to others may be altered by the circumstances: driving through heavy traffic at a high rate of speed is ordinarily reckless, but is not so if the driver is transporting a seriously injured person to the hospital emergency room.

Once the trial court has made the threshold determination as to whether there is sufficient evidence of egregious conduct under the standard of malice or reckless indifference to federally protected rights, it can place the issue before the jury in an appropriate case in a straightforward manner, without technical language describing applicable legal principles. *See Gehring v. Case Corp.*, 43 F.3d 340, 343-44 (7th Cir. 1994) ("Good instructions use simple words in short, concrete sentences."). One option not available to the district courts, however, is to place the issue in the hands of the jury without determining in the first instance whether the threshold requirements for malice or reckless indifference to federally

[16] Although some decisions have referred to the involvement of higher management as a basis for the submission of punitive damages to the jury, *e.g.*, *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 575 (8th Cir. 1997), *appeal after remand*, 124 F.3d 208 (1997), a hard and fast rule would be unfairly prejudicial to small employers who are more likely to have involvement in employment decisions by owners or other "top level" managers. Similarly, as explained by the court of appeals, "where the selection is to be made from among a narrow band of current employees well-known to the selectors, it is hard to see how there could not be a substantial degree of pre-selection -- unless the decision-makers were asleep at the switch or the candidates' track records were virtually identical" (Pet. App. 21a).

protected rights have been met. Intentional discrimination, without more, is not enough.[17]

V. THE DISTRICT COURT CORRECTLY APPLIED THE STATUTORY STANDARD BY NOT SUBMITTING THE PUNITIVE DAMAGES ISSUE TO THE JURY.

The record supports the district court's decision to withhold the issue of punitive damages from the jury, irrespective of the punitive damages standard articulated by this Court (other than adoption of plaintiff's proposal to submit every case of intentional discrimination to the jury).[18] In the district court's view, the evidence was not "even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler" (Pet. App. 71a). Thus, the conduct at issue was certainly not of a sufficiently egregious character to signify that the ADA was recklessly indifferent to the federally protected rights of plaintiff; neither was there sufficient evidence of malice to support a punitive damages award.

Plaintiff's evidence of sex discrimination boils down to the following allegations: (1) she was passed over for promotion in favor of a man, Spangler; (2) Spangler was pre-selected for the promotion; (3) Wheat, who had input

[17] The instruction tendered by plaintiff would have erroneously allowed the jury to equate intentional discrimination alone with the statutory standard required for punitive damages: "Evidence that the defendant intentionally violated plaintiff's civil rights will support an award of punitive damages if you, as the jury, find that the conduct merits a punitive award" (JA-102).

[18] The decision below may be affirmed on different grounds. *See Quakenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996); *Fay v. Noia*, 372 U.S. 391, 398 (1963).

into the selection decision, used the word "bitch" or "battleaxe" in the past to refer to two "prominent professional women" (Pet. App. 4a); and (4) Wheat also had told unspecified jokes referring to unspecified women's body parts (Oct. 18, 1995 Tr. 120-24).

Allegations of pre-selection are not dispositive of discrimination under Title VII, and *a fortiori* do not suffice to state a punitive damages claim. *See, e.g., Odom v. Frank*, 3 F.3d 839, 850 (5th Cir. 1993) (fact that decisionmakers have determined in advance who will fill a job does not amount to illegal discrimination); *Kennedy v. Landon*, 598 F.2d 337, 341 (4th Cir. 1979) (although pre-selection might violate employer's own rules, "it does not evidence the type of discrimination that is prohibited by Title VII"); *Blue v. Widnall, to be reported at* 162 F.3d 541, 1998 WL 832123 *5 (9th Cir. 1998) (plaintiff "failed to present evidence that any preselection resulted from a discriminatory motive instead of political considerations").

Wheat had significant input into the promotion decision (he ranked both candidates as meeting the minimum qualifications of the posting, but indicated that Spangler was more qualified), but Allen held responsibility for the final decision (Oct. 23, 1995 Tr. 64-65).[19] Unlike the committee

[19] Although the dissent below urged that the selection process might be considered a "sham" (Pet. App. 38a) in part because Dr. Allen used Spangler's Legislative Counsel job description to update the description for O'Donnell's job, there was "no evidence that the job has not in fact included those elements" (Pet. App. 3a). Plaintiff herself expressed surprise that O'Donnell's job description emphasized regulatory activity that he "had not done much of" (Oct. 19, 1995 Tr. 76), and she conceded that Spangler actually carried out these duties in succeeding O'Donnell (*id.* 77). If punitive damages were available under these facts, employers, particularly small employers, would be forever hamstrung in consolidating jobs or job requirements, for fear they might

which decided to terminate the plaintiff in *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990), *cited in Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 2257 (1998) (*see* Pet. Br. 46), Allen did not simply act as a "cat's paw" for Wheat's assessment of the plaintiff. Here, Allen received the opinions of Jack O'Donnell and Judy Sherman, as well as the opinion of Wheat, that Spangler was better qualified than the plaintiff for the promotion (Oct. 25, 1995 Tr. 72-73). Allen also utilized his personal knowledge of Spangler's and plaintiff's respective qualifications in reaching his decision to promote Spangler (Oct. 19, 1995 Tr. 160; Oct. 23, 1995 Tr. 105-06, 112-13). Thus, Allen did not simply act as a conduit for an allegedly discriminatory recommendation by Wheat.[20]

Plaintiff points to the message delivered by Dr. Allen to plaintiff after he selected Spangler for the job as probative of discrimination. Although the panel of the court of appeals found that the ADA's asserted nondiscriminatory reasons for choosing Spangler over plaintiff (that plaintiff lacked recent legislative experience and strong writing skills) could be viewed as pretexts "unworthy of belief" (Pet. 48a), these facts do not furnish a basis for imposing punitive damages, even assuming Dr. Allen was not frank with plaintiff in telling her the reasons she was not selected. In *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996), the court upheld a Title VII judgment for back pay and

be subject to a punitive damages claim of "preselection."

[20] By contrast, the *Shager* court noted that the biased supervisor's influence in setting the plaintiff up to fail by portraying his performance to the committee "in the worst possible light," "may well have been decisive" in the committee's decision to fire the plaintiff. 913 F.2d at 405. The committee's deliberations on the plaintiff's termination were brief, and no member could even remember having considered the issue. *Id.*

compensatory damages of an employee fired in connection with a controversy precipitated by her contemplation of an abortion. The court reversed the award of punitive damages, however, stating "although the actions of Holland Hospitality's employees were duplicitous and disclosed a lack of empathy, they did not rise to the level to support a punitive damages award under the Civil Rights Act of 1991." 85 F.3d at 1216.

Allen's role as the decisionmaker diminishes the significance of plaintiff's testimony that Wheat used "bitch" or "battleaxe" to refer to two other women not employed in the ADA's Washington office and made unspecified off-color jokes. However, even if Wheat's assessment had played a larger role in Allen's promotion decision, these allegations are weak support of sex discrimination at best, and certainly do not signify malice or reckless indifference.

Wheat did not refer to plaintiff herself in a derogatory manner, and his comments were unrelated to her application for the promotion. Thus, such comments are not supportive of a basic liability finding, let alone a punitive damages award. *See McCarthy v. Kemper Life Ins. Co.*, 924 F.2d 683, 686-87 (7th Cir. 1991), *quoting Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 1804 (1989) (unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of discrimination); *Neuren v. Adduci, Mastriani, Meeks, & Schill*, 43 F.3d 1507, 1513 (D.C. Cir. 1995) (supervisor's written evaluation of the plaintiff, referring to her as a "bitch," may have been inappropriately phrased, but was not in itself an indication of sex discrimination; rather, it was grounded in gender-neutral concerns about her relations with co-workers); *Williams v. KETV TV, Inc.*, 26 F.3d 1439, 1441 n.2 (8th Cir. 1994) (affirming judgment for employer on sex and race discrimination despite evidence at

trial that personnel involved in hiring decision referred to plaintiff as a "black bitch"); *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 329 (1st Cir. 1996) (noting that allegedly discriminatory statement did not mention the plaintiff and provided insufficient basis for an inference that the plaintiff was not offered the position he wanted because of his age); *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1266 (7th Cir. 1993) (a supervisor's occasional or sporadic use of a slur directed at an employee's race, ethnicity, or national origin, when unrelated to the decisional process, is insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements were uttered by a decisionmaker).

Moreover, plaintiff's inability to relay the substance of the supposedly offensive jokes made by Wheat severely undermines their potency as evidence of sex bias or motive. In *Santiago v. Canon U.S.A., Inc.* 138 F.3d 1, 5-6 (1st Cir. 1998), the plaintiff alleged that company representatives uttered "derogatory epithets denigrating [Santiago's] dignity as a woman and as a human being." But plaintiff did not specify the substance of the epithets, and the court found that her subjective perception of the statements could not demonstrate discriminatory intent.

This case does not present a close question on whether punitive damages should have been available. Indeed, had the district court judge not felt bound by circuit precedent to uphold the jury verdict, plaintiff would not have prevailed on liability on the evidence of preselection, "the only circumstantial evidence presented favorable to the plaintiff" (Pet. App. 71a). Plaintiff did not prove "*to the [district] Court's satisfaction* that her sex...had anything to do with her rejection" (Pet. App. 74a). As the court of appeals pointed out, "pre-selection by itself is neither unusual nor illegal, much less egregiously wrongful" (Pet.

App. 21a). The preselection evidence inferentially supported a finding of discriminatory intent "trivially at best" (Pet. App. 22a). In sum, the evidence presented by plaintiff "fails to show egregiousness in any form" (Pet. App. 13a).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals on the issue of punitive damages should be affirmed.

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Respectfully submitted,

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APPENDIX

42 U.S.C. § 1981a states:

Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil Rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5 or 42 U.S.C. 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3 or 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5 or 2000e-16](as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of Title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of Title 29

and the regulations implementing section 791 of Title 29, or who violated the requirements of section 791 of Title 29 or the regulations implementing section 791 of Title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act [42 U.S.C. 12112(b)(5)], against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)], from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)], or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party--

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20

or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section--

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means--

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VIII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794(a)(1) of Title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)[42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.